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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 423

LEVERING & GARRIGUES COMPANY, *et als.*,
Petitioners,

against

PAUL J. MORRIN, individually and as President of International Association of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. MERRITT LANE,
Attorney for and of Counsel with Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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2. The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws once having determined the federal question against plaintiffs, that question being, however, substantial..... 14

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3. The National Association being recognized by the law of Missouri, of which state it is alleged to be a resident, as a legal entity and the locals being recognized by the laws of the State of New York, of which they are alleged to be residents, as legal entities, they are to be treated as legal entities for purposes of federal jurisdiction 20

B. The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws having determined the federal question against plaintiffs, that question being, however, substantial 23

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No. .....

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Petitioners,

vs.

PAUL J. MORRIN, individually and as President of International Associati[illegible] of Bridge, Structural and Ornamental Iron Workers, *et als.*,
Respondents.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

(Italics, etc., mine, except where otherwise noted.)

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Levering & Garrigues, a corporation of New Jersey, McClintic-Marshall Company, a corporation of Pennsylvania, Hedden Iron Construction Company, a corporation of New Jersey, Hay Foundry & Iron Works, a corporation of New Jersey, humbly showeth:

1. Petitioners, all engaged in fabricating steel without the State of New York for the construction of buildings from material brought in from states other than those in which the plants are located, and in selling such fabricated steel F. O. B. New York City for erection therein (fabricated specially for specific buildings), and also in erecting such fabricated steel in New York City, filed their bill of complaint on March 11, 1925, to enjoin respondents, certain individuals, and Paul J. Morrin, individually and as president of International Association of Bridge, Structural and Ornamental Iron Workers and several locals of the International located in New York, from continuing a secondary boycott against plaintiffs, for the purpose of forcing plaintiffs, who had operated open shop since 1906, to abandon that policy and enter into closed union shop agreements with the International and its locals, the effect of which would be that, for practical purposes, the entire building industry in the Metropolitan district would be completely unionized and no non-union workman could secure employment, the industry now being completely unionized with the exception of the erection of structural iron and steel. The charge was one of conspiracy to attain an illegal object and likewise that illegal means were employed, threats, intimidation and the like, to accomplish the success of the boycott (p. 1). The jurisdiction of the court was rested upon: (1) diversity of citizenship; (2) unlawful interference with interstate commerce; (3) violation of constitutional rights of plaintiffs. Upon the filing of the bill temporary restraint went which, after argument, was continued pending final hearing. Initially certain defendants were included, the residence of whom would have defeated the jurisdiction based upon diversity of citizenship, but

they were dismissed, and from that point on no question was raised by respondents as to the jurisdiction of the court based upon that ground.

2. The International was not made a party by its recognized name, but was sued as "Paul J. Morrin, as president of International Association of Bridge, Structural and Ornamental Iron Workers," as permitted by chapter 20 of the General Associations Laws of New York, section 12 (Cahill's Consolidated Laws of New York, 1923, p. 704, article 3, section 12; Cahill's Consolidated Laws of New York, 1930, p. 895; appendix, p. 27). The locals were sued in the form permitted by the laws of New York and also by their recognized names as permitted by the laws of the United States (*United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 56 L. Ed. 975, at p. 985). Respondent Paul J. Morrin individually and "as president of International Association of Bridge, Structural and Ornamental Iron Workers" and the locals filed an answer (p. 43), which raised no question as to the jurisdiction of the Court based upon the ground of diversity of citizenship. Paragraph 2 of the answer alleges that Arthur Bolton, who was one of the defendants, was a resident of New Jersey, which is the residence of two of plaintiffs, but he had been dismissed from the suit before the filing of the answer and that matter was out. Respondents likewise filed a counterclaim against plaintiffs (p. 63) appealing to the jurisdiction of the Court for relief upon various grounds (p. 75), some based upon the Federal Anti-Trust Acts, and others upon the common law, with respect to the latter of which the Court could only have jurisdiction if there was diversity of citizenship (unless there was a Federal question).

3. By consent an order of reference was made to a Master (p. 85), who took voluminous testimony (p. 86 to 1673). He filed a voluminous report (p. 1966 to 2017), finding that no constitutional rights of plaintiffs had been violated, and that they were not entitled to relief under the anti-trust acts, but that they had proven their charges of the employment of illegal methods and recommending a decree for an injunction. To this report respondents filed twenty-nine exceptions (p. 2018), no one of which questions the jurisdiction of the Court. On February 14, 1930, a final decree was entered (p. 2037) in pursuance of the Master's report. Respondents appealed to the Circuit Court of Appeals for the Second Circuit, and filed 18 assignments of errors (pp. 2047 to 2164), no one of which questions the jurisdiction of the Court.

4. The appeal was heard by the Circuit Court of Appeals upon the merits and neither in the briefs of counsel nor in the argument was any question raised as to the jurisdiction of the Court. The Court directed a reargument upon the question as to whether the allegations of the bill, admitted by the answer, were sufficient to indicate diversity of citizenship. The case was reargued and plaintiffs contended: (1) that the allegations of the bill were sufficient; (2) that, irrespective of diversity of citizenship, the Court had jurisdiction because of the charge in the bill that respondents were engaged in a conspiracy in restraint of trade (p. 19, par. 18), and that, although the Federal question was decided adversely to plaintiffs, the District Court did not lose jurisdiction and might proceed to final decree upon the other issues made by the pleadings. The Circuit Court of Appeals handed down a decision on August 30, 1932 (p. 2181) (not yet reported) holding that the allega-

tions of the bill as to the residence of the Unions were not sufficient and that the case was not one in which the rule of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed. 753, at page 757, should be applied, and remanded the case to the United States District Court with leave to that Court to allow plaintiffs to amend by dismissing as against the Locals or by inserting appropriate allegations to show that no one of their members was a citizen of New Jersey or Pennsylvania when the bill was filed and if that were not done, then to dismiss the complaint without prejudice for lack of jurisdiction.

5. The averments with respect to the residences of the International and the Locals are as follows (p. 3):

"Defendant Paul J. Morrin is a resident, citizen and inhabitant of the State of Missouri. Defendant International Association of Bridge, Structural and Ornamental Iron Workers is a voluntary labor organization and is a resident, citizen and inhabitant of the State of Missouri."

Each of the Locals against which the decree went is alleged to be a subsidiary of the International and a resident, citizen and inhabitant of the State of New York and furthermore two of the Locals involved are alleged to have their headquarters in New York and the other is alleged to have jurisdiction over stone derrickmen in New York.

The allegations of the bill with respect to the citizenship and residence of these defendants were not denied in the answer (pars. 2, 3 and 4, p. 44) and the effect of the failure to deny is an admission. *Thronateeska Pecan Co.* v. *Matthews,* Circuit Court of Appeals, 5th Circuit, 277 Fed. 361; new Equity Rule No. 30.

Notwithstanding the decision of this Court in *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L. Ed. 975, at p. 984, to the effect that labor unions

might be sued in the Federal Court in equity by their recognized names and that it is not necessary to make the individual members parties, the Circuit Court of Appeals held that the District Court had no jurisdiction based upon diversity of citizenship unless it was specifically alleged that each of the individual members of the labor organizations had his residence in a State other than that of plaintiffs, the effect of which is that international labor organizations can neither sue nor be sued in the Federal Court, if the jurisdiction is rested solely upon diversity of citizenship, nor can local labor organizations if by chance one of their members happens to reside in the place of residence of a plaintiff or defendant as the case may be, which is precisely the situation which led this Court, in 1853, to finally determine in *Marshall* v. *Baltimore & Ohio Railroad Co.*, 16 How. 314, 14 L. Ed. 953, that, for purposes of federal jurisdiction, a corporation is a citizen of the State of incorporation, although this Court had previously held that a corporation could not be sued in the Federal Court where the jurisdiction rested solely upon diversity of citizenship. *Strawbridge* v. *Curtis*, 3 Cranch. 267, 2 L. Ed. 435 (1806); *Hope Insurance Co.* v. *Boardman*, 5 Cranch. 57, 3 L. Ed. 36 (1809); *Bank of U. S.* v. *Deveaux*, 5 Cranch. 61, 3 L. Ed. 38 (1809).

The change in the attitude of this Court is indicated by *Sullivan* v. *Fulton Steamship Co.*, 6 Wheat. 450, 5 L. Ed. 302 (1821); *Commercial & R. Bank* v. *Slocomb*, 14 Peters 60, 10 L. Ed. 354 (1840); *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 How. 497; 11 L. Ed. 353 (1844).

6. The Circuit Court of Appeals stated that this Court had not yet passed upon the precise issue but that the decisions in *Chapman* v. *Barney*, 129 U. S. 677, 32 L. Ed.

800 (1888), involving a joint stock company, and *Great Southern Fireproof Hotel Co.* v. *Jones,* 177 U. S. 449, 44 L. Ed. 842 (1899), involving a limited partnership association, and *Thomas* v. *Board of Trustees,* 195 U. S. 207, 49 L. Ed. 160 (1904), involving a board of trustees, were strongly persuasive against the contention of plaintiffs that, for purposes of federal jurisdiction, it should be conclusively presumed that all of the members of a labor organization were residents of the state in which it had its recognized headquarters, precisely the same as it is conclusively presumed that the stockholders of a corporation have their residence in the State of incorporation and for the same reason, and, if that were not so, then still federal jurisdiction, based upon diversity of citizenship, could be sustained upon the theory of Mr. Justice Wayne in *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson,* 2 How. 497, 11 L. Ed. 353 (1844), at p. 376, which was to the effect that, even if it be considered that *all* the stockholders were not residents of the State of incorporation nevertheless if *some* of them were (that State being a different one from that of the residence of the opposite party) the jurisdiction was not defeated for the stockholders who had their residence in the State of the opposite party could be alone included as parties.

The Circuit Court of Appeals for the Second Circuit had considered the subject in *Ex Parte* Edelstein, 30 Fed. (2d) 636, certiorari denied, 279 U. S. 851 (1929), 73 L. Ed. 994, and two of the Judges had reached the same conclusion as arrived at by the Court in this case with a strong dissenting opinion by Manton, Judge, to which I respectfully refer, 30 Fed. (2d) 638.

7. The Circuit Court of Appeals further held that the conduct of respondents did not constitute a conspiracy to illegally restrain interstate trade within the meaning of the Anti-Trust and Federal Trade Commission Acts and the decisions of this Court in *Bedford Cut Stone Co.* v. *Journeymens S. C. Ass'n.*, 274 U. S. 38, 71 L. Ed. 916; *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349, 16 A. L. R. 196; *Loewe* v. *Lawlor*, 208 U. S. 274, 52 L. Ed. 488; *United States* v. *Brims*, 272 U. S. 549, 71 L. Ed. 403; holding rather that the case was governed by *Industrial Assn. of San Francisco* v. *United States*, 268 U. S. 64, 69 L. Ed. 849; *United Leather Workers Int. Union* v. *Herket & Maisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104. The Court did *not* hold that the claims of petitioner under the Anti-Trust and Federal Trade Commission Act were frivolous although *intimating* that it was inclined to believe that the question could not properly be thought doubtful even when the bill was filed March 11, 1925, but expressly stating that it did not decide the point nor rest its decision upon it (pp. 2192, 2193).

In the District Court the original brief of petitioners submitted to the Master consisted of some 11 pages, respondents' original brief, 12 pages, petitioners' brief in reply, 12 pages, and respondents' brief in reply, 10 pages, and plaintiffs' brief in reply, 21 pages, and the Master considered the federal question upon the merits (p. 2013). The federal question was never abandoned by plaintiffs and was urged upon the argument of the appeal upon the merits, that is to say, plaintiffs argued that, even if the Master were wrong in finding that respondents were guilty of illegal acts violating plaintiffs' common law rights, still the decree was right because the Master should have held

that the conduct of respondents was in violation of the Anti-Trust and Federal Trade Commission Acts. It was contended by plaintiffs that even if the Master was right in holding that the conduct of respondents did not come within the condemnation of the Anti-Trust and Federal Trade Commission Acts, nevertheless a substantial federal question having been presented, at least as of the date of the filing of the bill which is the date to be considered (*Michigan C. R. Co.* vs. *Vreeland*, 227 U. S. 59, 57 L. Ed. 417), the jurisdiction of the Federal Court attached and it was bound, or at least privileged, to decide all questions involved in the case even if not raising a federal question under the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753, approved *Louisville & N. R. Co.* v. *Garrett*, 231 U. S. 298, 58 L. Ed. 229, at p. 239; *Chicago and Great Western R. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, at p. 188; *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 48 L. Ed. 896, at p. 897; *Binderup* v. *Pathé Exchange*, 263 U. S. 291, 68 L. Ed. 308, at p. 314.

8. The Circuit Court of Appeals recognized the authority of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at p. 191, 53 L. Ed. 753, to the effect that, if there was a claim as to the invalidity of a State statute because in violation of the Federal constitution, notwithstanding the fact that the Court held ultimately adversely upon the Federal question, nevertheless, it had jurisdiction and might decide the merits of the case upon other grounds, but it said that the principle was not of universal application referring to the line of cases represented by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, and then, after adverting to the fact that there was no decision of this Court to point out the line of differentiation, the Circuit Court of Appeals

attempted to harmonize the two lines of cases "as best we may" and reached the conclusion, as I understand it, that it is only when it is *necessary* to decide the non-federal question in order to determine the merits of the federal question that the rule of *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 757, applies, which view has never been expressed by this Court as conceded by the Circuit Court of Appeals, that Court stating (p. 2190):

> "We think it (the differentiation) is consistent with the actual decisions of the Supreme Court, although no authority has been found which has clearly enunciated it, and it must, indeed, be recognized as scarcely consistent with some of the views expressed in Judge Denison's learned opinion in Vogue Co. *v.* Vogue Hat Co., 12 F. (2d) 991 (C. C. A. 6)."

9. This writ is applied for because of the following reasons:

a. The Circuit Court of Appeals in its determination that the allegations with respect to citizenship and residence of the Union associations were not sufficient to confer jurisdiction upon the federal court based upon diversity of citizenship decided an important point of federal law which has not been, but should be, settled by this Court and in a manner probably in conflict with applicable decisions of this court, the question, at this day, being just as important as was the question as to whether a corporation could sue or be sued in the federal courts, the jurisdiction being based solely upon diversity of citizenship.

b. The Circuit Court of Appeals in its determination that, notwithstanding that the jurisdiction of the federal court was invoked upon the ground that there

was a substantial question involved arising under the laws of the United States, the District Court having decided adversely to the plaintiffs as to the federal question, could not proceed to determine the merits of the case arising under general and local and state laws, cut down the effect of this court's determination in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, at p. 191, 53 L. Ed., at 757, in a manner probably in conflict with the applicable decisions of this court, and in direct conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, in which latter case the Circuit Court of Appeals for the Sixth Circuit said that *its* views were in conflict with the decision of the Second Circuit Court of Appeals in *Bernstein* v. *Danwitz*, 190 Fed. 604, 605. *General Investment Co.* v. *Lakeshore and Railway Co.*, 269 Fed. 235, another decision of the Sixth Circuit Court of Appeals, in which, at p. 241, the Court expressed the same views as in the later case of *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991, came to this court in 260 U. S. 261, 67 L. Ed. 244 and this court affirmed, with modification, not important here, and there was no criticism in the opinion of this court of the language of the Circuit Court of Appeals for the Sixth Circuit as to the effect of this court's decision in *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 53 L. Ed. 753. The Second Circuit Court of Appeals (conceded by itself) is in irreconcilable conflict with the Sixth Circuit Court of Appeals as to the effect of this court's decision in the case last cited.

10. Although the record in this case consists of upwards of 2100 pages, if this Court should award a writ of certiorari, limited to a discussion of the matter mentioned in subdivision A, paragraph 9 hereof, all of the pertinent facts could be submitted to this Court in a record which

would not exceed twenty-five pages, and I believe that if the certiorari be allowed and a review of both the matters involved in paragraphs a and b be permitted, the record could be confined to one not exceeding fifty pages, and perhaps considerably less.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court on a day certain to be therein designated a full and complete transcript of the record of all proceedings of the said United States Circuit Court of Appeals for the Second Circuit and of the District Court of the United States for the Southern District of New York and all proceedings in both courts (or such parts of such record as this court may direct), to the end that the said case may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate and that the said decree of the United States Circuit Court of Appeals for the Second Circuit be set aside and that the decree of the United States District Court for the Southern District of New York be affirmed.

And your petitioners will ever pray.

MERRITT LANE,
Attorney for and of Counsel with
Petitioners.

BRIEF IN SUPPORT OF APPLICATION FOR CERTIORARI.

I.

The Opinions of the Courts Below.

There was no opinion of the United States District Court for the Southern District of New York. The Court made its decree upon the report and decision of a Master printed in the record (p. 1966), not reported. The decree of the United States District Court is printed (p. 2037 of the record).

The opinion of the Circuit Court of Appeals for the Second Circuit is printed (p. 2181) and is not reported.

II.

Jurisdiction.

The jurisdiction of this Court is rested on Section 240 of the Judicial Code as amended by the Act of February 13, 1925, ch. 229, Sec. 1, 43 Statutes 938; Sec. 347, U. S. C. A., p. 359, Title 28, subdivision A of said Section.

III.

The grounds upon which the jurisdiction of this Court is invoked.

The grounds upon which the jurisdiction of this Court is invoked are set forth fully in paragraph 9 of the petition, page 10.

IV.

Statement of the Case.

The case is fully stated in the petition (paragraphs 1 to 7, pp. 1 to 8).

V.

Specifications of Error.

1. The Circuit Court of Appeals erred in holding that the averments with respect to citizenship and residence of the labor associations respondents were not sufficient, and in holding that there is no jurisdiction in the District Court based upon diversity of citizenship where voluntary labor associations are involved unless all of the members of such associations are residents in states other than the states in which the opposite parties have their residences.

2. The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general local or state laws once having determined the federal question against plaintiffs, that question being, however, substantial.

3. The Circuit Court of Appeals erred in not affirming the decree of the District Court instead of remanding the case to that Court and directing that Court to dismiss the bill without prejudice unless plaintiffs should be granted leave to amend by alleging that the members of the asso-

ciations defendants were all residents of states other than those in which plaintiffs reside and by proving such fact if it were denied.

ARGUMENT.

A.

The Circuit Court of Appeals erred in holding that the averments with respect to citizenship and residence of the labor associations respondents were not sufficient, and in holding that there is no jurisdiction in the District Court based on diversity of citizenship where voluntary labor associations are involved unless all of the members of such associations are residents in states other than the states in which the opposite parties have their residences.

Much of the argument under this point has been indicated, necessarily, in the petition in stating the decision of the Circuit Court of Appeals (pars. 5, 6, pp. 5 to 7).

1.

Under federal law voluntary labor associations are to be considered residents of the State in which they have their recognized headquarters irrespective of the residence of their members.

This Court decided in *Strawbridge* v. *Curtis,* 3 Cranch. 267, 2 L. Ed. 435 (1806); *Hope Insurance Co.* v. *Boardman,* 5 Cranch. 57, 3 L. Ed. 36 (1809); *Bank of U. S.* v. *Deveaux,* 5 Cranch. 61, 3 L. Ed. 38 (1809), that a corporation could neither sue nor be sued in the Federal Court (the jurisdiction resting on diversity of citizenship) because it could not be considered a citizen. There then followed *Sullivan* v. *Fulton Steamship Co.,* 6 Wheat. 450, 5 L. Ed. 302 (1821),

and *Commercial & R. Bank* v. *Slocomb,* 14 Peters 60, 10 L. Ed. 354 (1840). In 1844 Mr. Justice Wayne, writing for this Court in *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson,* 2 How. 497, 11 L. Ed. 353, said that a corporation was, for the purposes of jurisdiction, a citizen of the state "by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs" and that, although the corporators as individuals were not defendants to the suit, they were parties having an interest in the result and if some of them were citizens of the state in which the suit was brought, jurisdiction attaches over the corporation and was not defeated by the fact that some of the members resided in a different state.

This Court, finally, in *Marshall* v. *Baltimore & Ohio R. R. Co.,* 16 How. 314, 14 L. Ed. 953 (1853), reviewed the entire matter and held, as I understand the opinion of Mr. Justice Grier, that, while the corporate intangible entity could not in a true sense have citizenship, nevertheless it took to itself the citizenship of its corporators, the corporators acting in unison and that, although the corporators might be citizens of different states, for purposes of jurisdiction over the corporation, they were estopped to deny but that they were residents of the state of incorporation. The basis of the decision of this Court was *practical necessity* and, in the light of present day conditions and of the opinions of this Court subsequently to be mentioned with respect to labor unions, every word of the opinion of Mr. Justice Grier in *Marshall* v. *Baltimore & Ohio R. R. Co.,* 16 How. 314, 14 L. Ed. 953, at p. 958, *et seq.,* will be found to be applicable to labor organizations and associations of similar type.

In *Gompers Case,* 221 U. S. 418, 439, 55 L. Ed. 797, 805, this Court pointed out that labor unions were substantially in a class by themselves.

And, finally, in *United Mine Workers of America* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L. Ed. 975, at page 984, this Court held that, although at common law an unincorporated association of persons was not recognized as having any other character than a partnership and could only sue or be sued in the name of its members the growth and necessities "of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection which their members have found necessary," and that they had been recognized in fact as legal entities and that they might sue and be sued in their recognized name "out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise." This Court pointed out that legislation had recognized them as legal entities.

This Court, as one of its reasons for holding that a labor union might be sued in its own name, said that to remand persons injured to a suit against each of the 400,000 members to recover damages and to levy on its share of the strike fund would be to leave them remediless. But now the Circuit Court of Appeals holds that, notwithstanding the fact that the labor union may be sued in its own name, it is necessary to allege and prove the residences of the "400,000 members."

Judge Rose, in his Third Edition, Federal Jurisdiction and Procedure, secs. 279 and 276, while conceding that it had been held in at least one case that the citizenship of the members must be alleged said: "But the reasoning of the Supreme Court in the Coronado case would appar-

ently point to an opposite conclusion, although as diversity of citizenship was not the ground of jurisdiction there relied on, this precise question was not discussed and may not have been considered."

Judge Lindsley, in *Russell* v. *Central Labor Union*, 1 Fed. (2d) 412, at page 414, in which the argument was made that the logical consequence of the decision of this Court in *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, was that the citizenship and residence of the individual members of a labor organization need not be alleged, said that the reasoning "is not without force but such positive modification of the law should be made by the Supreme Court."

Judge Manton, of the Circuit Court of Appeals for the Second Circuit, in a well considered dissenting opinion in *Ex Parte Edelstein*, 30 Fed. (2d) 636, said that the citizenship and residence of the members need not be alleged.

In *Chapman* v. *Barney*, 129 U. S. 677, 32 L. Ed. 800, this Court held that, although a limited partnership association might sue or be sued in the name of its president under state law, it could not so sue or be sued in the Federal Court. But the effect of that decision, so far as voluntary labor associations are concerned, is overthrown, submit, by the decision of this Court in *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975, to the effect that, even without the aid of statutes, labor organizations may sue and be sued in the name of the association. In *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 44 L. Ed. 842, this Court held that, although a limited partnership association created under the Pennsylvania statute might be described as a *quasi* corporation, it could not be regarded as a corporation for purposes of federal

jurisdiction. In *Thomas* v. *The Board of Trustees,* 195 U. S. 207, 49 L. Ed. 160, at page 165, this Court said that, for jurisdictional purposes the citizenship and residences of the individual members of the board of trustees was controlling.

But these cases all involved a strictly limited number of individuals and they were all decided before *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344, 66 L. Ed. 975, and this Court, notwithstanding them, had no difficulty in holding in *United States* v. *Adams Express Co.,* 229 U. S. 381, 57 L. Ed. 1237, that a voluntary association might be indicted and punished as an entity under a federal statute.

Since the decision of the *Coronado* case many suits have been brought against labor unions in the Federal Courts, the jurisdiction being based upon diversity of citizenship, without alleging the citizenship or residence of the individual members, one of which at least came to this Court and was decided on the merits (so far as the matter now involved is concerned) without any question being raised as to the jurisdiction of the Court. *Barker Painting Co.* v. *Local No. 734, Brotherhood of Painters, Paperhangers and Decorators of America,* 281 U. S. 462, 74 L. Ed. 967.

It is true that in that case the National Brotherhood made a party was stated in its answer to be a corporation, but the locals were mere voluntary associations. The allegations in the bill both with respect to the national body and the locals as to citizenship and residence were precisely the same as the similar allegations in the case at bar. The case was considered upon its merits (so far as the matter now under discussion is concerned) in all the courts, 12 Fed. (2d) 945, 34 Fed. (2d) 3, 280 U. S. 550, 74 L. Ed. 608, 281 U. S. 462, 74 L. Ed. 967. At no stage of the proceed-

ings was the objection made which the Circuit Court of Appeals for the Second Circuit has raised in the case at bar *ex mero motu.*

2.

If the citizenship and residence of the members of the labor organization is the determining factor, then the allegations of the bill are sufficient, and being admitted by the answer (because not denied) and the jurisdiction being acquiesced in by respondents throughout the case, no question can now be raised as to jurisdiction. The associations are alleged to be citizens and residents of specific states. The answer does not deny the allegation. Hence, under Equity Rule 30 and *Thronateeska Pecan Co.* v. *Matthews,* Circuit Court of Appeals, 5th Circuit, 277 Fed. 361 at page 365, the allegations must be considered as admitted.

Not only did respondents, by failing to answer, admit these allegations but they filed a counterclaim for relief with respect to part of which the Court could only have jurisdiction upon the ground of diversity of citizenship.

Under the circumstances, we submit, assuming that the citizenship and residence of the members of the association is the determining factor, respondents must be considered as having admitted the requisite citizenship and residence of the members by their conduct in not questioning the sufficiency of the allegations and in acquiescing throughout the case both in the truth of the allegations and in the fact of jurisdiction in the Court.

3.

The National Association being recognized by the law of Missouri, of which state it is alleged to be a resident, as a legal entity and the locals being recog-

nized by the laws of the State of New York, of which they are alleged to be residents, as legal entities, they are to be treated as legal entities for purposes of federal jurisdiction.

By the Laws of Missouri, Missouri Statutes Annotated, c. 32, sec. 4526, p. 1983; revised statutes 1919, sec. 9722 (Appendix, p. 29), and by the decisions of that State, St. Louis Court of Appeals. *Syz* v. *Milk Wagon Drivers Local 603* (not officially reported), 24 S. W. 2d Series 1080, 1082; *Wiehuechter* v. *Miller*, 208 S. W. 39, 276 Mo. 322, associations such as labor unions are treated as corporations for purposes of litigation and jurisdiction. And so also by the laws of New York, Constitution of New York, Article 8, Sec. 3, Cahill's Consolidated Laws of N. Y. 1923, p. 22; 1930, p. 20; secs. 12, 13, 16, Article 3, c. 20 of the General Association Laws of New York; Cahill's Consolidated Laws of N. Y. 1923, p. 705, 1930, p. 895 (Appendix, pp. 27, 28). Notwithstanding that this Court said, in *Chapman* v. *Barney*, 129 U. S. 677, 32 L. Ed. 800 (1889) that, although a voluntary association might be authorized by the laws of the State of New York to bring suit in the name of its president, that fact could not give the company power, by that name, to sue in the Federal Court, Mr. Justice Holmes, in delivering the opinion of this Court in *United States* v. *Adams Express Co.*, 229 U. S. 381, 57 L. Ed. 1237 (1913) holding that the Express Co., although a voluntary association, might as an association be indicted and punished, relied upon the fact that the constitution and laws of New York recognized the association as an entity and, in the course of his opinion, he said: "We refer to it simply to show the semi-corporate standing that these companies already had locally as well as in the popular minds * * *."

And Judge Rose, in his Third Edition Federal Jurisdiction and Procedure, secs. 275 and 276, p. 262, commenting upon new Equity Rule 37, says: "Possibly, under this rule, it will be held that on the equity side a suit may hereafter be maintained by some one authorized by state statute to sue on behalf of a joint stock company or limited partnership *providing the citizenship of such plaintiff be different from that of any of the defendants.* The rule may be construed to make the citizenship of the person for whom he sues immaterial."

The unions other than the International in this case were sued not only by their recognized names but also in the method provided by the state's statute, to wit, in the name of their presidents.

In *Duplex Printing Press Co.* v. *Deering* (254 U. S. 443; 65 L. Ed. 349) the unions were sued in the name of their Presidents as permitted by the laws of New York and no question was raised but that the union as such were parties, this Court so holding relying upon equity rule 38. In the case at bar, counsel answering for Paul J. Morrin as President of the International, appeared for the International and the Circuit Court of Appeals fell into error when it said (p. 2184) "that the International itself was not made a party." The jurisdiction in the *Duplex* case was based upon the Anti-Trust Acts.

I submit that if it be the fact that these great labor organizations, possessing the powers which this Court has in many cases adverted to, endowed both by Congress and by state legislatures with powers equivalent to those of any corporation, and recognized throughout the land as legal entities, can escape the jurisdiction of the federal courts in any case based upon diversity of citizenship by having

a member resident in each of the states of the union, it should be authoritatively so determined.

The matter is not one which may be corrected by act of Congress. The decision rests upon a construction of the Constitution of the United States and can only be determined in the last analysis by this Court.

B.

The Circuit Court of Appeals erred in holding that, although the jurisdiction of the District Court was invoked upon the ground that the case was one arising under the laws of the United States, the District Court had no jurisdiction to proceed and determine the case upon the merits under general, local or state laws having determined the federal question against plaintiffs, that question being, however, substantial.

I have rather fully set forth (paragraphs 7, 8, p. 8) of the petition the line of argument upon this phase of the case so far as I deem appropriate upon this application.

The conflicting opinions of the Circuit Court of Appeals for the Sixth and Second Circuits: *Vogue Co.* v. *Vogue Hat Co.*, 12 Fed. (2d) 991 (6th); *General Investment Co.* v. *Lake Shore and M. S. R. R. Co.*, 269 Fed. 235, at page 241 (6th); *Bernstein* v. *Danwitz*, 190 Fed. 604 (2d); and the case at bar, indicate beyond question that one or the other Circuit Courts of Appeal has misapprehended the scope of this Court's decision in *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, at page 191, 53 L. Ed. 753, reaffirmed by this Court as lately as *Chicago Great Western R. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, page 188.

The manner in which the Circuit Court of Appeals for the Second Circuit attempts to harmonize *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175, at page 191,

53 L. Ed. 753, and the cases following it with what it conceives to be a limitation upon the rule of that case illustrated by *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 677, 45 L. Ed. 365, really results in giving no effect whatever to what this Court said in the Siler case, for, as I understand the opinion of the Circuit Court of Appeals, it is to the effect that only where it is necessary for the Federal Court to determine the local question first so that it may be able to reach a conclusion as to the ultimate question involving the federal constitution or statutes, does the District Court have power to determine the local question, which certainly is not the conception either of the bar or of the Sixth Circuit Court of Appeals of what this Court held in the Siler case. I do not think that it has ever been questioned but that the Federal District Court had the power to determine the local question if it were necessary so to do to determine the federal matter. What *was* questioned was whether, if jurisdiction was based upon the ground that the case arose under the Constitution and the laws of the United States, that federal question being substantial, the Court having determined that question against the plaintiffs, the Court could then proceed and determine the case upon its merits according to local law, and I submit that *that* was the question which was answered in the affirmative by this Court in the Siler case.

It is suggested by the Circuit Court of Appeals that at the time this bill was filed, March, 1925, which is the important date (see *Michigan C. R. Co.* v. *Vreeland*, 227 U. S. 59, 57 L. Ed. 417 (1913); *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 62 L. Ed. 551 (1918), the federal question was not doubtful. But it expressly declined to decide the point or to rest its decision upon it. The Circuit

Court of Appeals mentioned *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 66 L. Ed. 975; *United Leather Workers Int. Union* v. *Herket & Maisel Trunk Co.*, 265 U. S. 457, 68 L. Ed. 1104, as having been decided at that time. But likewise, this Court had decided *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308; *Ramsey* v. *Associated Bill Posters*, 260 U. S. 501, 67 L. Ed. 368.

The Circuit Court of Appeals referred to its decision in *Aeolian Co.* v. *Fisher*, 29 Fed. (2d) 679 (1928), in which case, by a divided Court, it affirmed the District Court in denying a motion for a temporary injunction, but when the case came to the Circuit Court of Appeals again on the refusal of the District Court to grant a permanent injunction, 35 Fed. (2d) 34, it reversed the District Court, 40 Fed. (2d) 190. The decisions of the Circuit Court of Appeals in the Aeolian case illustrate better than anything else could, perhaps, that the claim of plaintiffs under the Anti-Trust and Federal Trade Commission Acts, considered as of 1925 was at least substantial and I urge now that the Master and the Circuit Court of Appeals erred in holding that respondents were not involved in a conspiracy to restrain interstate trade. It is only when the claim is so unsubstantial as that it would be forthwith stricken that it can be deemed so unsubstantial as to be frivolous or, in other words, plainly without color of merit (see *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 68 L. Ed. 308, at p. 314) as that federal jurisdiction cannot be maintained upon the allegations contained in the bill. No motion to strike was made in the case at bar. The matter was urged and fully briefed in the District Court and again in the Circuit Court

of Appeals and the Master determined it upon its merits against plaintiffs, and I think erroneously.

The Circuit Court of Appeals for the Second Circuit refers to the fact that there was no motive on respondents' part to interfere with interstate commerce. As to this suggestion *International Organization* v. *Red Jacket C. C. Co.*, 18 Fed. (2d) 839; *United States* v. *Reading*, 226 U. S. 324, 57 L. Ed. 243, holding that, where the necessary results of the acts performed pursuant to or contemplated by the conspiracy is to restrain trade between the states, the intent is presumed, supply the answer.

I submit that, upon the merits, the case is within *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916, and *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 65 L. Ed. 349. But however that may be, it can hardly be said that the allegations with respect to interstate commerce were so frivolous as to be without color.

Not only did plaintiffs fabricate this steel for erection by themselves in New York but they fabricated it for sale to others F. O. B. New York for erection by them and the steel was specially fabricated in the plants of plaintiffs for specific buildings and the raw materials going into the steel came from still other states. The effect on interstate commerce was just as direct as was the effect of the conduct of the defendants in *Bedford Cut Stone Co.* v. *Journeymen S. C. Ass'n*, 274 U. S. 37, 71 L. Ed. 916.

It is respectfully submitted that this case is one calling for the exercise by this Court of supervisory powers and that a writ of certiorari should be granted.

MERRITT LANE,
Attorney for and of Counsel with
Petitioners.

Appendix.

Cahill's Consolidated Laws of New York, 1930, page 895, Article III, secs. 12, 13 and 16:

"Sec. 12. Action or proceeding by unincorporated association. An action or special proceeding may be maintained by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. (Added by L. 1920, ch. 915, April 15, 1921.)"

"Sec. 13. Action or proceeding against unincorporated association. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer is deemed an association within the meaning of this section. (Added by L. 1920, ch. 915, April 15, 1921.)"

"Sec. 16. Subsequent action against members. Where an action has been brought against an officer, or a counterclaim has been made, in an action brought by an officer, as prescribed in this article, another action, for the same cause, shall not be brought against the members of the association, or any of them, until after final judgment in the first action, and the return, wholly or partly unsatisfied or unexecuted, of an execution issued thereupon. After such a return, the party in whose favor the execution was issued, may maintain an action, as follows:

1. Where he was the plaintiff, or a defendant recovering upon a counterclaim, he may maintain an action against the members of the association, or, in a proper case, against any of them, as if the first action had not been brought, or the counterclaim had not been made, as the case requires; and he may recover therein, as part of his damages, the costs of the first action, or so much thereof, as the sum collected by virtue of the execution, was insufficient to satisfy.

2. Where he was a defendant, and the case is not within subdivision first of this section, he may maintain an action, to recover the sum remaining uncollected, against the persons who composed the association, when the action against him was commenced, or the survivors of them.

But this section does not affect the right of the person, in whose favor the judgment in the first action was rendered, to enforce a bond or undertaking, given in the course of the proceedings therein. Section eleven of this chapter applies to an action brought, as prescribed in this section against the members of any association, which keeps a book for the entry of changes in the membership of the association, or the ownership of its property; and to each book so kept. (Added by L. 1920, ch. 915, April 15, 1921.)"

Constitution of New York, Article VIII, sec. 3, Cahill's Consolidated Laws of New York, 1923, page 22, 1930, page 20:

> "Corporation, definition of term—sec. 3. The term corporations as sued in this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

Missouri Statutes Ann., C. 32, Sec. 4526, p. 1983, Rev. Stat., 1919, Sec. 9722, Corp.— *term defined:*

> "The term 'corp.' as used in this chapter, shall be construed to include all joint stock companies or associations having any powers or privileges not possessed by individuals or partnerships."